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IN THE

Supreme Court of the United States

October Term, 1946.

No. 1147

JOSEPH A. GORDON,

Petitioner,

vs.

PAUL A. PORTER, Price Administrator,

Respondent.

Petition for Writ of Certiorari to the United States Emergency Court of Appeals and Brief in Support Thereof.

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IN THE

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October Term, 1945.

No.....

JOSEPH A. GORDON,

Petitioner,

vs.

PAUL A. PORTER, Price Administrator,

Respondent.

Petition for Writ of Certiorari to the United States Emergency Court of Appeals and Brief in Support Thereof.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Joseph A. Gordon, prays that a writ of certiorari issue to review the final judgment of the United States Emergency Court of Appeals dismissing the complaint of petitioner filed under Section 204(a) of the Emergency Price Control Act (56 Stat. c. 26 (June 30, 1944); 58 Stat. 632, 640, c. 325; 50 U. S. C. A. Appx., §901, 11 F. C. A., Title 50, Appx. 25; 50 U. S. C. A. Appx., §925; Public Law No. 108, 79th Cong., 1st Sess. (59 Stat. ....., Chap. 214)), hereinafter called the Act.

Opinion Below.

The opinion of the Emergency Court of Appeals [R. 95], filed February 19, 1946, is not yet reported.

Jurisdiction.

The judgment of the Emergency Court of Appeals was entered February 19, 1946 [R. 98].

The petition for rehearing of petitioner under Rule 27 of that court, filed March 7, 1946 [R. 100] by order enlarging the time so to do and including March 8, 1946 [R. 98], was denied by order entered March 26, 1946 [R. 110].

The jurisdiction of this court is invoked under Section 204(d) of the Act which reads as follows:

> "Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals, as provided in Section 240 of the Judicial Code, as amended (U. S. C., 1934 Edition, Title 28, Sec. 347.)"

The filing of this petition within thirty days after the entry of the order in the Emergency Court of Appeals denying the petition for rehearing is timely upon the authority of *Gypsy Oil Co. v. Escoe,* 48 S. Ct. 112, 275 U. S. 498, 72 L. Ed. 393.

Questions Presented.

Where a party attacking the validity of certain provisions of price regulations, issued by respondent as Price Administrator, contends that he has been deprived of due process of law in that, in determining his classification, as directed by the Administrator, he is compelled to rely upon information supplied by third parties not controlled by him and that to prescribe such a procedure for determining his classification and to deny him the opportunity of having the other retailers brought before the Administrator and examining them as to their volume of business, deprives him of a hearing embracing the requirements of due process of law, did the Emergency Court of Appeals err in holding (1) that this contention involves only application and interpretation of said administrative orders and that, consequently, the Declaratory Judgment Act, 28 U. S. C. A., Section 400, provides an efficient and complete remedy, thus satisfying the demands of due process and relieving the Emergency Court of Appeals of the necessity of deciding the question of whether the prescribed procedure is fatally at fault, (2) that the propriety of the classification as a matter of fact and the interpretation of the regulations are questions for the enforcement court alone?

Does this administrative procedure amount to deprivation of due process of law?

Statutes Involved.

The Emergency Price Control Act, above cited.

Statement.

By his complaint [R. 83, *et seq.*] under Section 204(a) of the Act, filed October 10, 1945, in the Emergency Court of Appeals, petitioner alleged and the Price Administrator admitted in his answer [R. 91, *et seq.*] the following facts:

The regulations of the Administrator protested by petitioner in his protest [R. 1, *et seq.*] filed January 2, 1945 [R. 9] and denied September 14, 1945 [R. 34] were Maximum Price Regulations 422, 423 and 390 (8 F. R. 9395, 9407, 6428) and Los Angeles Order No. 5 under General Order No. 51 (56 Stat. 23, 765; Pub. Law 151, 78th Cong.; E. O. 9250, 7 F. R. 7871 and E. O. 9328, 8 F. R. 4681) [R. 83, 84]. (The classification scheme of which petitioner complains appears identically in Section 31(b) of M. P. R. 422, Section 21(b) of M. P. R. 423, Section 12(b) of M. P. R. 390 and Section 5 of L. A. Order No. 5 issued under General Order No. 51. L. A. Order No. 5 is printed in full in the record here [R. 55-62]. Sections 4 and 5 of L. A. Order No. 5 [R. 59-61] contain the specific provisions of which complaint is here made. Hence, a reference to the language in Sections 4 and 5 of L. A. Order No. 5 amounts, in effect, to a reference to all other cited provisions of the named regulations.)

During the period from January 1, 1944, to and including June 5, 1944, for some time prior thereto and continuously since the latter date, petitioner has been the owner of the independent retail grocery department in the market known as Bargain Town Market in Compton, California [R. 84]. (The errors here urged do not involve the liquor and vegetable departments in this market and references thereto are omitted.)

Ever since January 1, 1942, and for some time prior thereto, there has been a retail meat department in Bargain Town Market [R. 84].

Petitioner has never owned, operated or had any interest in this meat department and during all of the time mentioned herein the meat department has been independently owned and operated [R. 84].

The Administrator determined that petitioner's grocery store was a so-called Group 4 store, at all times from January 1, 1944, by applying the formula devised by him in the protested regulations [R. 84, 85]. These regulations [R. 59, 60] provide that Group 2 includes independent retail stores with annual gross sales of $50,000 or more, but less than $250,000, while Group 4 includes stores with annual gross sales of $250,000 or more.

Annual gross sales for the years 1942, 1943 and 1944, respectively, determined the group classification for the period from January 1, 1944, to and including June 5, 1944; from the latter date to March 5, 1945; and from the latter date to the time the complaint was filed on October 10, 1945, respectively, under later amendments [R. 38, footnote 5].

During each of the years 1942, 1943 and 1944, petitioner's annual gross sales were $50,000 or more, but less than $250,000 [R. 84]. On the basis of these amounts alone petitioner would have been determined to be a Group 2 store during all of the times here mentioned. However, the Administrator determined that he was a Group 4 store by taking the combined annual gross sales of all the food retailers in Bargain Town Market for the appropriate year [R. 25, 26]. He based this action upon a provision in the protested regulations stating that

in determining annual gross sales the total annual sales of all food departments in each retail store shall be included, whether or not all such departments are owned or operated by the same person [R. 61]. (The provision that if two or more retailers operate departments selling a complete line of the same food commodities in the same store, then each retailer determines his gross annual sales by the total sales of his own department alone [R. 61] is not applicable here because petitioner's was the only grocery store in Bargain Town Market.) The Administrator said that he obtained the information from the other retailers in Bargain Town Market and that when the annual gross sales of the meat retailer were added to petitioner's annual gross sales, the aggregate for each of the years mentioned was more than $250,000 and that, consequently, petitioner was a Group 4 store during all of the periods here mentioned [R. 25, 26].

Group 2 price ceilings, to which petitioner claimed to be entitled, are generally higher than Group 4 price ceilings, which the Administrator said must be his ceilings.

On the basis of his determination above set forth, the Administrator commenced an action on September 4, 1944, in the District Court of the United States, Southern District of California, Central Division, under Sections 205(c) and 205(f) of the Act and obtained in October, 1945, a judgment upon findings (among other things) that between March 27, 1944, and June 5, 1944, petitioner violated the regulations here attacked by selling commodities at prices higher than the prices provided for Group 4 stores, suspending petitioner's license, issued to him by the Administrator, to sell price controlled commodities [R. 85]. The Administrator contended, and the

District Court agreed with him, that petitioner's prices must be at the lower Group 4 level rather than at the higher Group 2 level which petitioner claimed. This suspension has been stayed during the pendency of the appeal therefrom taken by petitioner to the Circuit Court of Appeals for the Ninth Circuit [R. 85], where the case is now pending.

The Administrator likewise admitted that the District Court at all times held it had no jurisdiction to pass upon the validity of the applicable regulations, but that such jurisdiction belonged exclusively to the Emergency Court of Appeals initially and to this Court on review of the judgment of the Emergency Court of Appeals [R. 85].

This complaint also asserted the invalidity of the provisions of the regulations here considered [R. 86-89], which the Administrator denied. He admitted that petitioner did not, and could not, keep account of the 1942, 1943 and 1944 sales of the other retailers and that the petitioner did not know if their records were correct [R. 88, 89].

The petitioner asked that the provisions of the regulations here considered be adjudged invalid at all times since January 1, 1944 [R. 89].

As already stated, the Emergency Court of Appeals entered judgment dismissing the complaint [R. 98] and denied the petition for rehearing of petitioner [R. 110].

The opinion of the Emergency Court of Appeals notes that the Administrator refused to permit him to have subpoenas issued in the protest proceeding for the other retailers in Bargain Town Market so that petitioner might examine them [R. 96], this action of the Administrator appearing in the record here [R. 9].

Reasons for Granting the Writ.

This case involves an important question of federal law which has not been, but should be settled by this Court and decides a federal question in a way probably in conflict with applicable decisions of this Court.

The provisions of the regulations here attacked do not need any interpretation. They are plain as day. They can be applied only in one way. This is not a case where a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort or for the same business under other circumstances. These provisions are valid or invalid, constitutional or unconstitutional, in all circumstances. There is no doubt as to their meaning. Here is what they said to petitioner: In determining your annual gross sales to determine the group in which your store is to be and, consequently, your price ceilings include the total annual sales of all food departments in Bargain Town Market, whether or not all such departments are owned or operated by you. He was thus told to perform the simple task in arithmetic of adding to his own 1942 annual gross sales, of which he had, of course, a record, the 1942 gross sales of the other retailers, in whose stores he had no interest, under the same roof and concerning which he had no record and thereby determine the group in which his store was to be. He was later told by successive amendments to perform the same operation, substituting the years 1943 and 1944, respectively, to determine his classification for later periods.

No ambiguity, no doubt, requiring interpretation exists in the language of these provisions. If valid, they are clearly applicable to him. The only circumstance controll-

ing their application to him is the crucial one of validity. Hence, the only questions involved concern validity or constitutionality, not interpretation and application.

The questions of validity relate primarily to the requirement that his store is to be classified on the basis of records of sales kept, or supposed to be kept, by strangers over whom he has neither control, supervision, nor the right of inspection, and no reasonable opportunity to keep, for his own protection, records of the sales of these strangers.

The Emergency Court, and this Court on review, have exclusive jurisdiction to determine validity of regulations. (*Bowles v. Seminole Rock & Sand Company,* 89 Law. Ed. (Adv. Op.) 1186, and cases there cited.)

In the case at bar the Emergency Court has held that what are thus seen to be actually questions of validity are merely questions of interpretation and application. This major error, or so it seems to petitioner, then led that court to say that the Declaratory Judgment Act (28 U. S. C. A., Section 400) provided petitioner with an efficient and complete remedy preserving his constitutional rights. Consistently with this error, the Emergency Court then concludes that "we have no occasion to reach or to decide the question of whether, in the absence of this remedy, the procedure prescribed would be fatally at fault." The propriety of the classification, that court said, "as a matter of fact and the interpretation of the regulations are questions for the enforcement court."

This administrative procedure is unreasonable, arbitrary and capricious because it requires petitioner to depend upon, if the Administrator is to be sustained, the co-operation of the other retailers under the same roof in

obtaining data from them [R. 37, 46] which the Administrator has not required them to furnish by any prescribed time, or at all. As here administered, it is also constitutionally defective because the Administrator refused to issue subpoenas, upon petitioner's request, allowing petitioner to examine these other retailers to obtain information as to their sales. The standard for compliance with due process prescribed by this Court in *Nebbia v. New York,* 291 U. S. 502, 78 L. Ed. 940, 54 S. Ct. 505, 89 A. L. R. 1469, has therefore not been satisfied by the Administrator.

The questions here presented are of first impression in this Court. Their answer is needed by the Administrator and food retailers throughout the nation whose situation is the same as that of petitioner.

Conclusion.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted to review the judgment of the United States Emergency Court of Appeals.

April, 1946.

JOSEPH A. GORDON,
Petitioner.

By LOUIS H. BURKE,
Counsel for Petitioner.

DANIEL G. MARSHALL,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1945.

No. .....

JOSEPH A. GORDON,

Petitioner,

vs.

PAUL A. PORTER, Price Administrator,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

Opinions Below.

The opinion of the Emergency Court of Appeals, filed February 19, 1946 [R. 95], is not yet reported. The judgment was entered the same day [R. 95]. The petition for rehearing of petitioner under Rule 27 of that court, filed March 7, 1946 [R. 100], by order enlarging the time so to do and including March 8, 1946 [R. 98] was denied by order filed March 26, 1946 [R. 110].

Jurisdiction.

The grounds upon which the jurisdiction of this Court is invoked are stated in the petition at page 2.

Statement of the Case.

The facts have been related in the petition.

The essential contentions of petitioner might be usefully presented here. It is violative of due process, he contends, for the Administrator to prescribe a formula for classification which depends on information beyond the petitioner's power to have accumulated or to obtain; to fail to require the source of that information to furnish the same to him before the classification becomes effective; to refuse to assist petitioner in the protest proceeding in his effort to establish that information and to make him dependent on "co-operation" of strangers to obtain the same.

The Emergency Court of Appeals erred, he further claims, in holding these contentions to involve interpretation or application and, hence, to be within the jurisdiction of the enforcement court or the proper subject of a declaratory judgment suit, thus excusing it from passing upon the validity of the procedure.

Specifications of Errors.

The Emergency Court of Appeals erred:

1. In holding that the questions here presented involved interpretation and application of the provisions of the regulations attacked and not validity or constitutionality;

2. In holding that the constitutional rights of petitioner could have been preserved by an action under the

Declaratory Judgment Act and that the same afforded him an efficient and complete remedy by which he could have fully protected himself;

3. In refusing to decide the question of whether the procedure prescribed by said provisions is fatally at fault;

4. In failing to hold that said provisions amount to deprivation of due process of law;

5. In divesting itself of jurisdiction to decide the validity of said provisions in favor of the District Court in an enforcement action or one under the Declaratory Judgment Act.

Summary of Argument.

1. The provisions of the regulations here attacked are a deprivation of due process of law.

2. Validity, not interpretation and application, of said provisions is the issue here.

3. The decision of the Emergency Court of Appeals in holding that interpretation and application of said provisions are all that is here involved, in refusing to decide the issue of validity, and in divesting itself of jurisdiction of the only issue here in favor of the enforcement court or in favor of a declaratory judgment action conflicts with decisions of this Court.

ARGUMENT.

The Provisions of the Regulations Here Attacked Are a Deprivation of Due Process of Law.

The provisions of the regulations here attacked required petitioner to determine his classification by using a factor which he had no opportunity or right to obtain. His annual sales for each of the years here involved were less than $250,000. On the basis of those amounts alone, petitioner would be a Group 2 store during all of the periods here mentioned. He was commanded, however, to add to his annual sales for each of these years another figure. This other figure was the amount of the annual sales of the other independent retailers under the same roof, complete strangers to him in a legal sense. He had no right to require them to keep records, to supervise the manner in which they were to be kept. He had no right to inspect them, nor did he have any opportunity, within reason, to keep such records of the sales of the other retailers for his own protection and upon his own responsibility.

The administrative scheme here considered provided no official method by which his classification could be determined. The Administrator confessed that his scheme lacked provision for official determination by a belated amendment issued September 28, 1945, in which he recognized, at last, that a retailer might be unable to secure the annual gross sales figures from other food retailers in the store and provided for the application by a food retailer, finding himself in such a situation, to apply to the nearest district office of the Administrator for a determination of his probable classification [R. 75]. While petitioner contends that this amendment does not cure the inherent lack of due process here present, some reason-

ableness, at least, was grafted into the scheme as of the date of said amendment. Obviously, the amendment cannot control the situation existing before that.

Furthermore, on the effective dates of the classification here attacked there was no requirement that the other retailers must furnish petitioner, and all others in his situation, with the required data from their records indispensably necessary for him to apply the classification formula.

The Administrator has defended against this attack upon the ephemeral ground that each retailer could depend upon the co-operation of the other retailers to obtain the necessary information. Certainly, so vague and nebulous a factor as co-operation cannot be a constitutional foundation for the scheme here defended by the Administrator.

The total effect of the scheme is to establish an unreasonable, arbitrary and capricious device. It was unreasonable for the Administrator to establish this scheme which made petitioner depend upon others to determine his standard of conduct. It was arbitrary for the Administrator to fail to provide a method of official determination. It was capricious of him to fail to require the other retailers to supply the needed information to petitioner in sufficient time for him to have properly determined his classification.

Being thus unreasonable, arbitrary and capricious, the scheme must fall by reason of the rule declared by this Court in *Nebbia v. New York,* 291 U. S. 502, 78 L. Ed. 940, 54 S. Ct. 505, 89 A. L. R. 1469, as follows:

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects State action,

do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

Hence, the only valid classification of petitioner's store would place him in a Group 2 store.

Validity, Not Interpretation and Application, of Said Provisions Is the Issue Here.

It is respectfully submitted that a mere reading of the provision here attacked establishes that neither interpretation nor application thereof is here involved.

It provides as follows:

"In determining annual gross sales, the total annual sales of all food departments in each retail store shall be included, whether or not all such departments are owned or operated by the same person. (For example, a retailer who operates a grocery department in a retail store must include the annual gross sales of the butcher, the fruit and vegetable dealer, the baker, the delicatessen, etc., even though such departments are owned or operated by other persons. Restaurants should not be included.)" [R. 61].

No canons of interpretation are required for this language. It is crystal clear in its literal meaning. The question is, however, is it valid? Petitioner contends that it is not for the reasons stated in the preceding point.

The Decision of the Emergency Court of Appeals in Holding That Interpretation and Application of Said Provision Are All That Is Here Involved in Reviewing to Decide the Issue of Validity, and in Divesting Itself of Jurisdiction of the Only Issue Here in Favor of the Enforcement Court or in Favor of a Declaratory Judgment Action, Conflicts With Decisions of This Court.

It has been firmly settled by this Court that the Emergency Court of Appeals, and this Court on review, has exclusive jurisdiction to determine the validity of regulations issued by the Administrator. (*Yakus v. United States,* 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834.)

If the Emergency Court of Appeals had recognized the true situation here as being one concerning validity, there is no doubt that it would have decided whether or not invalidity here existed. Its misconception of the issue here, resulting in its mistaking interpretation and application for validity, compelled it to reach the result it did. The result logically forced upon it by its misconception is to divest itself of jurisdiction to decide the issue here, in plain conflict with the noted decision of this Court.

It has wrongly surrendered this jurisdiction, first to the enforcement court under the misconception that the propriety of the classification as a matter of fact, and the interpretation of the regulations, are involved. Obviously, propriety of classification involves validity and in-

volves it exclusively in this action. This being so, the hands of any other court, except its own and this Court, are tied. Interpretation is not involved. A school boy could apply the prescribed formula if he had the required data. There is nothing for the enforcement court to interpret.

The Emergency Court of Appeals next surrenders its jurisdiction to a suit under the Declaratory Judgment Act. Plainly, this kind of action deals exclusively with matters of interpretation, but since no interpretation is here needed this surrender is wrong too.

Conclusion.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted and that this Honorable Court should review the decision of the United States Emergency Court of Appeals and finally reverse it.

April, 1946.

LOUIS H. BURKE,
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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1147

JOSEPH A. GORDON, PETITIONER

v.

PAUL A. PORTER, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Price Administrator's opinion (R. 35–47) is not reported. The opinion of the United States Emergency Court of Appeals (R. 95–97) is reported at 153 F. 2d 614.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on February 19, 1946 (R. 98), and the order denying the petition for rehearing was entered on March 26, 1946 (R. 110). The petition for a writ of certiorari was filed on April 22, 1946. The jurisdiction of this

Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended by the Stabilization Extension Act of 1944, c. 325, 58 Stat. 632, 50 U. S. C. App. (Supp. IV) 901, and by the Act of June 30, 1945, Pub. No. 108, 79th Cong., 1st Sess. (herein sometimes termed "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTIONS PRESENTED

1. Whether the Emergency Court of Appeals failed to pass upon any question properly presented to it.

2. Whether regulations, under which a retailer's classification for price control purposes depends on the sum of his annual gross sales for the base period and those of separately owned departments in the same store, are invalid as not affording to the retailer a reasonable means of ascertaining his classification and, hence, his maximum prices.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, appear in the Appendix, *infra,* pp. 11–16. The maximum price regulations involved and pertient amendments thereto are printed in the Federal Register (8 F. R. 6428, 9395, 9407). Los Angeles Order No. 5 and pertinent amendments thereto are not

printed in the Federal Register, but are set forth in the record (R. 55, 65, 69).

STATEMENT

During 1943, the Price Administrator issued a series of regulations which, together, prescribed maximum prices for retail foods stores.[1] These regulations classified such stores into four groups for pricing purposes, the classification depending in the main upon the volume of sales during a designated base year. Thus, Group 2 includes stores having a base-period sales volume ranging from $50,000 to $249,999, and Group 4 maximum prices are applicable to stores having a base-period sales volume of $250,000 and over. Group 2 maximum prices are, in general, somewhat higher than Group 4 prices.

Petitioner operates the grocery department in an establishment called the Bargain Town Market; a meat dealer and a fruit and vegetable dealer operate the other departments in that market (R. 1, 3–4). Under the applicable regulations, the store classification of all the retailers in such a market is determined on the basis of the combined annual gross sales of all the retailers in the store (R. 12).

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[1] Maximum Price Regulation No. 390, issued May 14, 1943; Maximum Price Regulations Nos. 422 and 423, issued July 8, 1943; Los Angeles Order No. 5, one of a number of community ceiling price orders, issued December 15, 1943.

On March 27, 1944, the Office of Price Administration issued a warning notice to petitioner to the effect that although he was within the Group 4 classification, he had been selling items at prices higher than those prescribed by the applicable regulations for that store group (R. 23). On September 4, 1944, the Price Administrator, pursuant to Section 205 (f) (2) of the Act, instituted an action in a district court for suspension of petitioner's license to sell for alleged violation of Group 4 price ceilings. Petitioner contended, in that action, that the sales' volume applicable to the period in question was less than $250,000 and that consequently he was within the Group 2 classification. The district court found that petitioner's selling outlet was properly classified as a Group 4 store and ordered his license suspended for violating the applicable price ceilings. (Pet. 6–7, R. 38, 43.) An appeal from the judgment of the district court is now pending before the United States Circuit Court of Appeals for the Ninth Circuit (Pet. 7, R. 85).

This enforcement action gave rise to a second course of litigation, instituted on January 2, 1945 (R. 9), by a protest which the petitioner filed with the Price Administrator under Section 203 (a) of the Emergency Price Control Act (R. 1–8). Petitioner challenged the factual basis for the license-suspension action, suggesting that the sales volume applicable to the petitioner's selling outlet was less than $250,000, and requested that the

Price Administrator inquire into the gross sales of the other occupants of the market (R. 8), and classify petitioner as a Group 2 store (R. 4–5). The Price Administrator rejected this request on the ground that it was concerned with a question of fact not appropriately presented in a protest proceeding (R. 14).[2] The protest also advanced the contention that it was unreasonable to base the classification in part upon facts which petitioner was required to ascertain from the other retailers sharing the market. This objection was fully considered by the Administrator and found to be without merit (R. 37–40).

Following denial of the protest (R. 34), petitioner filed a complaint with the United States Emergency Court of Appeals in accordance with Section 204 (a) of the Emergency Price Control Act (R. 83–89). The court dismissed the complaint, holding that petitioner had not been denied reasonable opportunity to ascertain its classification. The court further held that determination of the factual issue as to which classification was applicable to petitioner's case was not proper in the protest and review proceedings under Sections 203 (a) and 204 (a) of the Act. (R. 95–97.)

[2] It was, of course, necessary for the district court, in the enforcement proceeding, to make a finding as to petitioner's proper classification before considering whether petitioner had violated the Group 4 price ceilings.

ARGUMENT

1. Petitioner's principal contention in support of the petition is that the court below refused to decide whether reasonable opportunity had been afforded him to ascertain facts necessary for a determination of his proper status under the regulations, and instead, concluded that the district court, in the enforcement action or in a suit for a declaratory judgment, had jurisdiction to decide that question (Pet. 17–18). This suggestion is plainly erroneous, and appears in part to arise from a confusion of the question of the validity of the regulations with the factual issue as to the volume of sales in the Bargain Town Market which determined petitioner's maximum price under the regulations.

As the opinion below indicates, the Emergency Court of Appeals fully considered and decided the question which petitioner raised as to the reasonableness of the regulations. But the protest had sought to go further, by demanding that the Administrator subpoena witnesses and hold a hearing to determine the factual issue, then raised in the enforcement action, as to the volume of sales in the Bargain Town Market. The Administrator and the Emergency Court of Appeals were plainly correct in rejecting this attempt to inject into the protest proceeding a factual issue resolution of which was unnecessary to the exercise of the jurisdiction conferred upon the Emergency

Court of Appeals to determine the validity of maximum price regulations.[3]

2. Petitioner urges that the regulations have denied him due process of law because he has not been afforded a reasonable means of ascertaining his maximum price. This contention rests on the fact that petitioner's classification depends upon the total of his own sales and the sales of the other retailers sharing the market. In this connection, petitioner urges that it is unreasonable and unconstitutional for his maximum price to be based on facts which are not wholly within his own possession and control.

It is significant that the petition has not attempted to develop the contention that petitioner

[3] Section 203 (a) of the Act authorizes the filing of protests "setting forth objections" to provisions of maximum price regulations. Section 204 (a) authorizes the filing of complaints with the Emergency Court of Appeals "praying that the regulation, order, or price schedule protested be enjoined or set aside." Section 204 (d) confers exclusive jurisdiction upon the Emergency Court of Appeals and upon this Court "to determine the validity" of maximum price regulations. The Emergency Court of Appeals has held that it will resolve disputed questions as to the interpretation of a provision of a regulation wherever that action is a necessary step in deciding whether that provision is valid. *Alan Levin Foundation* v. *Bowles*, 152 F. 2d 467. But as the opinion below shows, resolving the factual issue as to the volume of sales in the market was in no wise necessary to consideration and determination of the question as to the validity of the regulation; consequently there was no jurisdictional basis upon which the Emergency Court of Appeals could consider this question.

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did not in fact know or have reasonable means of knowing whether total sales in the market in which he operated were more or less than $250,000. Nor does the record admit of such a contention (R. 38–39). Instead, petitioner's complaint appears to be that the structure of the regulations is intrinsically unreasonable and violative of due process of law.

As the Administrator found in the protest proceeding, there is no basis in fact for this view. In resting his attack upon the bare fact that each retailer in the market is in part dependent upon information gratuitously supplied him by the others, petitioner ignores the obvious realities of the situation outlined in the Price Administrator's opinion (R. 37). All the retailers in the market have the joint problem of computing the classification, which they all share, on the basis of their total sales. Thus, each is dependent upon the others for exchange of information, and there is no basis for the suggestion that it is intrinsically unreasonable to require such retailers to secure information from each other in determining their common classification.

Not only is the provision basically reasonable, but, in addition, experience has confirmed its workability. As the record shows, in the years in which the provisions under attack have been in effect, retailers sharing a market have been able to determine their classification without difficulty

(R. 37, 46).[4] We submit that to find the provisions to be intrinsically unreasonable in the light of this fact "would be a negation of experience and common sense." See *United States* v. *Ragen*, 314 U. S. 513, 524.

In addition, as the court below held, the petitioner is not wholly dependent upon the information supplied voluntarily by the other retailers or obtained through the efforts of the Office of Price Administration. For example, an enforcement action was brought against the petitioner only after five months had elapsed since his receipt of a formal warning notice under Section 205 (f) (2), advising him that the volume of sales in his market placed his store in Group 4. The court below pointed out (R. 96–97), if there had been a basis for actual controversy between petitioner and the Office of Price Administration as to whether the volume of sales placed his store in Group 2 or Group 4, petitioner could have resolved that factual dispute by an action under the Federal Declaratory Judgment Act (48 Stat. 955, 28 U. S. C. 400).[5] In short, we submit that the

[4] Of the many retail food dealers subject to these requirements over a period of several years, only petitioner has challenged the validity of the procedure wherein facts must be ascertained from other associated retailers (R. 37).

[5] Since the institution of this proceeding, an administrative remedy has been added to the legal remedies otherwise available. Thus, the regulations have been amended to provide that in the event such a retailer is unable to ascer-

Emergency Court of Appeals was clearly correct in holding that petitioner had ample means and opportunity to determine the facts upon which his maximum prices depend.

CONCLUSION

The case was correctly decided and there is no warrant for further review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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Office of Price Administration.

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tain the sales volume which governs his store classification, he may apply to the Office of Price Administration for a formal order determining his classification (R. 80–81). Petitioner does not seriously contest the validity of the regulations as they now stand, nor is their substance to petitioner's suggestion that this amendment, which merely afforded an additional device for getting information, constituted a confession of the constitutional inadequacy of the preexisting procedure. Cf. Pet. 14–15, see *National Labor Relations Board* v. *Mackay Radio and Telegraph Co.*, 304 U. S. 333, 351.

Moreover, this amendment serves to make even less appropriate review by this Court of cases arising before its promulgation and which involve questions that can arise no longer.

APPENDIX

The pertinent provisions of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended by the Stabilization Extension Act of 1944, c. 325, 58 Stat. 632, 50 U. S. C. App. (Supp. IV) 901, and the Act of June 30, 1945, Pub. No. 108, 79th Cong., 1st Sess., are as follows:

PROCEDURE

SEC. 203. (a) At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the

event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is

made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

* * * * *

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any

price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

SEC. 205 (f)

* * * * *

(2) Whenever in the judgment of the Administrator a person has violated any of the provisions of a license issued under this subsection, or has violated any of the provisions of any regulation, order, or requirement under section 2 or section 202 (b), or any of the provisions of any price schedule effective in accordance with the provisions of section 206, which is applicable to such person, a warning notice shall be sent by registered mail to such person. If the Administrator has reason to believe that such person has again violated any of the provisions of such license, regulation, order, price schedule, or requirement after receipt of such warning notice, the Administrator may petition any State or Territorial court of competent jurisdiction, or a district court subject to the limitations hereinafter provided, for an order suspending the license of such person for any period of not more than twelve months. If any such

court finds that such person has violated any of the provisions of such license, regulation, order, price schedule, or requirement after the receipt of the warning notice, such court shall issue an order suspending the license to the extent that it authorizes such person to sell the commodity or commodities in connection with which the violation occurred, or to the extent that it authorizes such person to sell any commodity or commodities with respect to which a regulation or order issued under section 2, or a price schedule effective in accordance with the provisions of section 206, is applicable; but no such suspension shall be for a period of more than twelve months. For the purposes of this subsection, any such proceedings for the suspension of a license may be brought in a district court if the licensee is doing business in more than one State, or if his gross sales exceeded $100,000 per annum. Within thirty days after the entry of the judgment or order of any court either suspending a license, or dismissing or denying in whole or in part the Administrator's petition for suspension, an appeal may be taken from such judgment or order in like manner as an appeal may be taken in other cases from a judgment or order of a State, Territorial, or district court, as the case may be. Upon good cause shown, any such order of suspension may be stayed by the appropriate court or any judge thereof in accordance with the applicable practice; and upon written stipulation of the parties to the proceeding for suspension, approved by the trial court, any such order of suspension may be modified, and the license which has been suspended may be restored, upon such terms and conditions as such

court shall find reasonable. Any such order of suspension shall be affirmed by the appropriate appellate court if, under the applicable rules of law, the evidence in the record supports a finding that there has been a violation of any provision of such license, regulation, order, price schedule, or requirement after receipt of such warning notice. No proceedings for suspension of a license, and no such suspension, shall confer any immunity from any other provision of this Act: *Provided,* That no regulation, order, license, or requirement heretofore or hereafter issued or prescribed pursuant to section 2 (a) (2) of the Act of June 28, 1940, as amended by the Act of May 31, 1941, and by title III of the Second War Powers Act, 1942, may validly contain any requirement as to the observance of any regulation, order, license, or requirement issued or prescribed pursuant to this Act or the Stabilization Act of October 2, 1942.

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